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In the Supreme Court of the United States

OCTOBER TERM, 1989

RALPH J. ZOLA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within its authority when it ordered petitioner personally to cease and desist from further operations which had previously been denied only to corporations which he owned and controlled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 889 F.2d 508. The decision of the Interstate Commerce Commission (Pet. App. 29a-58a) is reported at 5 I.C.C.2d 655.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. A petition for rehearing was denied on December 18, 1989. Pet. App. 28a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For almost 20 years the Interstate Commerce Commission (ICC) has been investigating and attempting to stop the unlawful practices of companies owned and controlled by petitioner, Ralph J. Zola. In this case, the ICC ordered petitioner himself, not just the corporation he was currently using, barred from operating or holding out to provide service subject to ICC jurisdiction. /97/

The saga began in ~~1987~~ when the ICC instituted its first formal investigation into the practices of AAACon Auto Transport, Inc. (AAACon), to determine whether its unlawful practices warranted suspension or revocation of its authority to operate as a motor carrier in interstate commerce. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287 (*AAACon I*).

Extensive hearings were held before an administrative law judge (ALJ), who found that AAACon was not a fit carrier. *AAACon I* (not printed) (served Nov. 30, 1973) (*reprinted* at Gov't C.A. Addendum B). The ALJ listed ten specific practices from which AAACon should be required to cease and desist, and warned that noncompliance would result in revocation or suspension of part or all of AAACon's operating authority. *AAACon I*, at 14-15.[1]

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[1] Among other violations, the ALJ found that AAACon had deliberately pursued a course of arbitrarily denying just damage claims filed with it; had engaged in "blatant obstructionist tactics" to avoid settling claims; had used a "bill of lading agreement" for its shippers which differed significantly (to the shippers' detriment) from the one incorporated in its tariffs filed with the ICC; had held out to the public a type of service that it did not actually perform; had performed operations that were not authorized by its ICC certificate; and had violated various other provisions of the Act. *AAACon I*, at 9-10, 13.

The ALJ detailed petitioner's involvement as a principal shareholder, vice-president, treasurer, and director of the company; as its agent in the area of claims settlement, where many of the company's abusive practices were concentrated; and as founder of a law firm that maintained offices in common with AAACon and handled all claims for the company. *AAACon I*, at 4, 6, 10.

Both the Commission and the reviewing court affirmed the ALJ's cease and desist order. *AAACon Auto Transport—Investigation and Revocation of Certificate*, 124 M.C.C. 493 (1976), aff'd *sub nom. AAACon Auto Transport, Inc.* v. *ICC*, 553 F.2d 93 (2d Cir. 1977) (Table). Thereafter, as required by the order, petitioner filed an affidavit with the ICC certifying AAACon's compliance with the cease and desist order. Gov't C.A. Addendum K, App. E.

2. After continuing to receive numerous complaints from the public about AAACon's service, the ICC reopened the investigation proceeding to determine whether AAACon had violated the cease and desist order and, if so, whether its operating authority should be suspended or revoked. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287 (*AAACon II*). Extensive hearings lasting 63 days were conducted by a different ALJ. In his decision, he found that AAACon had repeatedly violated each of the ten paragraphs of the cease and desist order; that the violations were willful; and that AAACon's operating authority should be revoked. *AAACon II* at 2, 4-30, 44-45 (not printed) (served Feb. 28, 1983) (*reprinted at* Gov't C.A. Addendum K).

The ALJ determined that AAACon had demonstrated an attitude of "the public be damned"

(*AAACon II*, at 33, 35), and had "thumbed its nose" at the ICC's cease and desist order (*AAACon II*, at 43). In particular, the ALJ identified "the sustaining force behind [AAACon] as that of its president" —the petitioner—noting that "it is his views which dominate and permeate the entire company from the very top to its lowest levels" and his "view which prevails even when such view is not in accord with those of [the other members of the company's Review Committee]." *AAACon II*, at 36.

The Commission, judging the ALJ's findings to be "substantially correct in all material respects," affirmed and revoked all of AAACon's operating authority. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287, at 10, 23 (not printed) (served Aug. 7, 1984) (*reprinted at* Gov't C.A. Addendum F), aff'd *sub nom. AAACon Auto Transport, Inc.* v. *ICC*, 792 F.2d 1156 (D.C. Cir. 1986), cert. denied, 481 U.S. 1048 (1987). The ICC concluded that "[t]he record reveals violations from border to border and coast to coast, in a wide variety of aspects of [AAACon's] operations" and that "AAACon's disregard and apparent contempt for the public are pervasive." Gov't C.A. Addendum F at 15. The court of appeals agreed, characterizing the evidence of violations of the cease and desist order as "overwhelming." 792 F.2d at 1160.

3. Shortly after the ALJ decided that AAACon's authority should be revoked, members of the Zola family attempted to obtain new authority that could be used to perpetuate the AAACon operations under a different name. Pet. App. 6a. In June 1983, petitioner's father, Irving Zola, applied for a license for

a nonexistent company, using the name AA Babcock Transport, Inc. The ICC originally granted the application, but cancelled the authority when it discovered the fraud involved. *AA Babcock Transport, Inc.—Common Carrier Application*, I.C.C. No. MC-168499 (not printed) (served Jan. 31, 1986), aff'd *sub nom. AA Babcock Transport, Inc.* v. *ICC*, 821 F.2d 821 (D.C. Cir. 1987) (Table) (*reprinted at* Gov't C.A. Addenda G, H). Petitioner's sister, Marion J. Zola, submitted another application, but withdrew it when the ICC scheduled a hearing in the case to determine whether it was part of a scheme to continue the AAACon operations. *AA Aaron, Inc., Broker*, I.C.C. No. MC-171177 (not printed) (served Dec. 21, 1983) (*reprinted at* Gov't C.A. Addendum J); Pet. App. 7a.

4. Petitioner then engaged in what the court of appeals referred to as a "shell game" (Pet. App. 8a) to continue AAACon operations under different corporate names. On the day the AAACon revocation order became effective (October 8, 1984), petitioner purchased the controlling stock of North American Transport Co., Inc. (Natco), a defunct corporation whose only asset was its ICC license. The purchase price of $12,000 was paid by petitioner's personal check. Petitioner also established the Auto Caravan Corporation as a division of Natco with petitioner as its sole shareholder, officer, and director. Pet. App. 8a, 11a.

As detailed by the court of appeals (Pet. App. 8a-13a), petitioner explained to AAACon agents that the intent of the new agency agreements would "be to put you in the same position you were under AAACon's operation, with zero changes." Pet. App. 8a. As petitioner emphasized, "you are going to end

up on October 8th where you are on October 7th" because on that day "Auto Caravan shall, like Phoenix, arise from the ashes, and there is no way to stop it." Pet. App. 8a-9a. Tariffs, charges, contract terms, and telephone numbers were to remain the same as they had been when AAACon was in operation. Pet. App. 8a.[2]

As planned, the renamed AAACon operation continued uninterrupted after October 7, 1984, under petitioner's control. AAACon had operated through a network of company and agency offices situated in major cites throughout the continental United States. Natco/Auto Caravan conducted operations in the same way, using most of the same locations, addresses, telephone numbers, and managers or agents. Pet. C.A. App. 18-27, 99; see, *e.g.*, *id.* at 87-88.

When the ICC learned of petitioner's apparent evasion of the AAACon revocation order, it instituted a new proceeding to consider whether to revoke the new carrier's operating authority and whether to direct petitioner permanently to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within its jurisdiction. *Ralph J.*

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[2] Petitioner carefully instructed employees about how to respond to inquiries from the public. He suggested that customers be told: "We used to be with AAACon, not we used to be AAACon, but we used to be with AAACon. We found a name that is easier to spell. We bought greater authority." Pet. App. 10a. He added that "[t]he only thing I don't want you to do is tell them this is the same corporate entity." Pet. App. 11a. Customers were to be advised that Auto Caravan had the same insurance and contract terms as had AAACon. Persistent questioners were to be referred to petitioner or his colleague. Petitioner warned that it should never be said merely that AAACon had changed its name. Pet. App. 11a-12a.

Zola, North American Transport Co., Inc., and Auto Caravan Corp.—Show Cause Proceeding, I.C.C. No. MC-C-30003 (served Sept. 12, 1986); Pet. C.A. App. 9-12. After conducting extensive hearings, a third ALJ found that the record contained "convincing proof" of the nexus between AAACon and its successors, Natco/Auto Caravan, and of the unlawful continuation of AAACon's operations by those entities. *Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp.—Show Cause Proceeding*, I.C.C. No. MC-C-30003 (not printed) (served Dec. 15, 1987); Pet. C.A. App. 17. He also found that the record clearly demonstrated that petitioner was "the sole moving force" in willfully and unlawfully continuing AAACon's activities, operations, and business through Natco/Auto Caravan. *Id.* at 17, 30. He concluded that the only effective remedy was to revoke Natco's operating authority and direct petitioner personally to cease and desist from engaging, directly or indirectly, in any transportation activities within the ICC's jurisdiction. *Id.* at 27, 30, 31. The ICC, explicating the circumstances in similar terms, affirmed the ALJ's decision. *Ralph J. Zola—Show Cause Order*, 5 I.C.C.2d 655 (1989); Pet. App. 29a-58a.

5. The court of appeals affirmed both the revocation of Natco's operating authority and the cease and desist order issued against petitioner. Pet. App. 1a-27a. With regard to the latter, the court reviewed the long history of the ICC's efforts to bring petitioner's operations into compliance (Pet. App. 2a-16a) and petitioner's "extreme and—until now—successful attempts to flout the Commission's orders and evade its jurisdiction." Pet. App. 26a. The court concluded that the "exceptional circumstances" of the

case warranted the extreme measure of a debarment order. Pet. App. 23a, 26a.

The court found sufficient statutory authority for the agency to take such action in three sections of the Interstate Commerce Act: 49 U.S.C. 10925 (1982 & Supp. V 1987), which permits the agency to revoke operating authority; 49 U.S.C. 10321, which authorizes it to inquire into the business of those who control motor carriers; and 49 U.S.C. 11701 (1982 & Supp. V 1987), which authorizes the ICC to take appropriate action to compel compliance with the law. Pet. App. 25a. The court noted that this Court has confirmed that the ICC has broad authority to exercise remedial powers not expressly enumerated in the Interstate Commerce Act when necessary to achieve statutory goals. Pet. App. 18a-19a (citing *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984)).

The court of appeals partially remanded the case, directing the Commission to tailor the debarment order to exclude activities wholly unrelated to the transportation activities involved in the AAACon and Natco proceedings. Pet. App. 26a-27a.[3]

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[3] When the ICC issued its order on remand (*Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp. —Show Cause Proceeding* No. MC-C-30003 (not printed) (served Dec. 28, 1989), petitioner filed another petition for review. *Ralph J. Zola* v. *ICC*, No. 90-3018 (3d Cir. filed Jan. 16, 1990).

ARGUMENT

The court of appeals properly ruled that the ICC has the authority to take those steps necessary in the peculiar and extreme facts of this case to end finally the effective operation of the AAACon business. Its decision does not conflict with any decision of this Court or any court of appeals. Further review is therefore not warranted.

1. The ICC has broad discretion to choose appropriate remedies "when necessary to achieve specific statutory goals." *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 365 (1984). As in the case of those agencies entrusted with similar powers, the courts should intervene to overrule the Commission's selection of a remedy only where the remedy chosen "is unwarranted in law or is without justification in fact." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-113 (1946).

a. In this case, the Commission acted under 49 U.S.C. 10925(b) (1982 & Supp. V 1987) to terminate a long history of consumer abuse and statutory and regulatory violations by petitioner as the controlling force behind various corporations. Section 10925(b) provides that the agency may "[o]n complaint or on its own initiative and after notice and an opportunity for a proceeding, * * * suspend, amend, or revoke any part of a certificate, permit, or license" held by a motor carrier found willfully to have violated legal requirements, agency orders, or the conditions of its operating authority. Petitioner does not challenge the ample record that documents his attempt improperly to continue AAACon operations in the corporate form of Natco/Auto Caravan.[4]

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[4] We note that petitioner's only challenge is to that portion of the court of appeals' decision which upheld the ICC's au-

Petitioner's contention is, instead, that the Commission could not reach him as the "sole moving force" of the enterprise because he was a "non-licensee." Pet. 6-10. That contention ignores the court of appeals' conclusion that petitioner was, in fact, the "alter ego" of Natco/Auto Caravan, which was in turn simply a continuation of AAACon.[5] Pet. App. 24a; see also *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 672; Pet. App. 54a. As the court of appeals noted (Pet. App. 24a), the ICC's action is consistent with the principle that an agency may take action against the individuals controlling a regulated corporation. See, *e.g.*, *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937) (proper to include individual officers in "cease and desist" order where there is reason to believe that they will individually continue to attempt to evade the agency's order); *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983, 984-985 (9th Cir. 1971) (declining to reach issue whether cease and desist order could be issued against individual not expressly listed in section, where owner properly included in order as alter ego of company); *Guziak* v. *FTC*, 361 F.2d 700, 704 (8th Cir. 1966), cert. denied, 385 U.S. 1007 (1967) (corporate principals properly included in cease and desist order); see also *ICC* v. *Rio Grande Growers Cooperative*, 564 F.2d 848 (9th Cir. 1977). It is well settled that those who are officially responsible

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thority to act as it did. Petitioner does not challenge the affirmance of the agency's findings of fact. See Pet. i; Pet. App. 21a-22a.

[5] Petitioner's discussion of those entities that the Commission can "sanction" in addition to carriers thus misses the point. Pet. 7. Petitioner was acting *as* the carrier against which the agency needed to take action.

for the conduct of a corporation's affairs and who "prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty [are] no less than the corporation itself * * * guilty of disobedience." *Wilson* v. *United States*, 221 U.S. 361, 376 (1911).

b. The breadth of the Commission's authority is confirmed by 49 U.S.C. 11701 (1982 & Supp. V 1987). That Section provides that "[i]f the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance." In this case, the Commission determined after extensive hearings that the debarment order was necessary and appropriate "in direct furtherance of our affirmative duty to terminate illicit operations * * * and to protect the integrity of our regulatory processes." *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 670, 673.[6]

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[6] Petitioner contends (Pet. 12-13) that he is being subjected to the Commission's remedial authority without having been a party to any proceeding in which he was charged with wrongdoing. As the Commission put it, "[t]his argument overlooks the obvious." *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 671; Pet. App. 53a. The agency instituted *this* proceeding, which itself included extensive hearings and generated detailed findings of petitioner's improper actions, in order to investigate petitioner's activities. See *Zola—Show Cause Proceeding* (order instituting proceeding), Pet. C.A. App. 9-12; *Zola—Show Cause Proceeding* (initial decision), Pet. C.A. App. 17-27.

Similarly, petitioner objects (Pet. 4-6) that the revocation order issued in the first (AAACon) proceeding is improperly being used as an injunction against him. This argument also mistakes the matter: the Commission issued the cease-and-desist order against petitioner only after determining, in the present proceeding, that he had violated the Act by maintaining AAACon operations (clearly prohibited by the revoca-

Nor can there be any contention that the Commission did not have the authority to investigate petitioner's role in the operation of Natco. 49 U.S.C. 10321(b) provides that the Commission may:

> (1) inquire into and report on the management of the business of carriers providing * * * transportation * * * subject to this subtitle;
>
> (2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers * * *.[7]

2. Even if the foregoing provisions do not expressly confer authority on the ICC to enter a debarment order when necessary to effectuate a decision to revoke an operating license, the Commission has implied authority to enter such an order. Contrary to

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tion order) under the corporate auspices of Natco/Auto Caravan. Nor can petitioner successfully contend (see Pet. 5-6) that he lacked notice: the order initiating the proceeding stated that its purpose was to "show cause why * * * [petitioner should not be directed] permanently to cease and desist from engaging * * * in any for-hire transportation activities within th[e] Commission's jurisdiction." *Zola—Show Cause Proceeding*, Pet. C.A. App. 9.

[7] The ICC's power in such situations is not affected by the altogether independent proposition, supported by such cases as *Civil Aeronautics Bd.* v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961), and *SEC* v. *Sloan*, 436 U.S. 103 (1978) (cited at Pet. 8), that agencies may not exceed specific limitations in their enabling statutes. Contrary to petitioner's assertion (*ibid.*), those cases did not involve statutory provisions mandating an exclusive, judicial enforcement mechanism. In any case, there is no such exclusivity indicated here. Rather, the statute provides that the Commission "may" bring a civil action or refer a case to the Attorney General; it does not require the agency to pretermit administrative remedies in order to do so. 49 U.S.C. 11702, 11703 (1982 & Supp. V 1987).

petitioner's suggestion (Pet. 9-10) that the ICC can exercise no powers not explicitly listed in the statute, 49 U.S.C. 10321(a) establishes that:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission * * * does not exclude another power the Commission may have in carrying out this subtitle.

This Court has confirmed that the ICC possesses broad powers to carry out the objectives of the statute it is charged with administering. See, *e.g.*, *ICC* v. *American Trucking Ass'ns*, 467 U.S. at 365 (ICC's authority extends beyond the specific provisions of the statute to those actions which further a statutory mandate); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-655 (1978) (ICC has powers "adjunct" to enumerated powers); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311-312 (1953) (upholding ICC leasing rules, even though leasing was not referred to in the Act, as part of its authority to "administer, execute, and enforce all provisions of this part"). These powers are necessarily implied because the drafters of the statute could not "include specific consideration of every evil sought to be corrected." *American Trucking Assn's*, 344 U.S. at 309-310. As this Court has recognized, the absence of express authority should not force the ICC "to sit idly by and wink at practices that lead to violations of [the Act's] provisions." *Id.* at 311.[8]

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[8] Petitioner's contention (Pet. 7-8) that the Commission cannot exercise implied powers over him because Congress explicitly revoked any power it had over non-licensees when it repealed 49 U.S.C. 42 (1976) is without merit. This provision was repealed in 1978 as part of a general recodification of the Interstate Commerce Act that was designed to "restate,

3. Contrary to petitioner's contention (see Pet. 11-12), there is no conflict between the circuits concerning the ICC's authority to use administrative action in order to carry out its statutory mandates and to preserve the integrity of its own procedures.

As the court of appeals explained (Pet. App. 25a), *Wallach* v. *SEC*, 202 F.2d 462 (D.C. Cir. 1953), stands only for the limited proposition that the SEC may not discipline nonregistered salesmen of a registered broker-dealer under the authority of the provision defining the SEC's authority over brokers and dealers. And *Touche Ross & Co.* v. *SEC*, 609 F.2d 570 (2d Cir. 1979), far from aiding petitioner, confirms that *Wallach* did not reach the issue whether the SEC (let alone any other agency) can take action necessary to guard its own procedures or meet statutory duties under sections providing more general authority. *Touche Ross & Co.*, 609 F.2d at 680 n.16.[9]

4. Finally, the action taken by the Commission here is a rare occurrence. Should the issue arise

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without substantive change," the laws previously in force. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. As part of this process, Congress omitted Section 42, which pertained to the joinder of parties in both ICC and judicial proceedings, on the ground that it was "[s]uperseded" since "[j]oinder of parties is now covered by the Federal Rules of Civil Procedure[]." H.R. Rep. No. 1395, 95th Cong., 2d Sess. 247 (1978). Thus, no inference can be drawn from the repeal of this section that Congress intended to curtail the Commission's powers to enforce its own orders.

[9] Petitioner claims that the ICC is not empowered to impose a "sanction" on him. Pet. 10-11. However, the order prohibiting petitioner from engaging in regulated transportation was issued as a remedial, not punitive, measure. Indeed, the agency left open the possibility that, at any time in the future, petitioner could apply for reinstatement. 5 I.C.C.2d at 674 n.15; Pet. App. 57a n.15.

more frequently, there is time enough for this Court to consider the issue presented after it has been more thoroughly deliberated in the courts of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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